MEMORANDUM
RESPONSE TO ISSUES RAISED AT INFORMAL CONFERENCE

To: John Baza, Director, Utah Division of Oil, Gas & Mining

cc: Ed Rogers, Wright/Garff Resources, LLC
Lon Thomas, Star Stone Quarries, Inc.

From: Division of Oil, Gas & Mining

Date: March 26, 2007

Re: Division's Determination to Not Process Wright/Garff Resources, LLC's Notice of Intention

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I. INTRODUCTION

The Division of Oil, Gas & Mining ("Division") responds to issues raised during an informal conference where Wright/Garff Resources, LLC ("Wright/Garff") challenged the Division's determination to not process Wright/Garff's notice of intention ("NOI")[1] for small mining operations in Summit County, Utah. John Baza, Director of the Division of Oil, Gas & Mining and hearing officer, asked the parties to address two issues:

1. What are the possibilities for dual permitting and what would be needed for implementation; could adequate definition of the parties' joint and separate responsibilities be developed for effective regulation; and

2. If dual permitting is not available, may the Division revoke or amend Star Stone Quarries' large mine permit to accommodate Wright/Garff's proposed mining operations?

This memorandum does not address the sufficiency of Wright/Garff's NOI, except to note that Wright/Garff's proposed mining operations further complicate the unique problems stemming from dual permitting. Wright/Garff's initiation of agency action does not name Star Stone

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[1] A "notice of intention" means a "notice to commence mining operations, including revisions to the notice." Utah Code Ann. § 40-8-4(16) (West 2004). A "permit" is issued by the Division to conduct mining operations after the notice of intention is filed and surety posted. *Id.* § 40-8-4(23).

Quarries, Inc. ("SSQ") as a party. Nevertheless, the Division considers SSQ a necessary party in this action and will treat it as such in this memo.

II. STATEMENT OF FACTS

A. Requirements for a Small[2] and Large Mine Notices of Intention.

As a point of reference, the Division begins with a brief description of the small and large mine permitting process. Before any operator begins a mining operation, the operator must first file a notice of intention to mine with the Division. Utah Code Ann. § 40-8-13(1)(a) (West 2004). The NOI must include certain information about the proposed mine including identification of all surface and mineral interests. *Id.* § 40-8-13(1)(b)(i). A large mine operator must include a reclamation plan, while a small mine operator must only include a "statement that the operator shall conduct reclamation as required by rules promulgated by the board." *Id.* § 40-8-13(1)(c),(d).

Upon receipt of the NOI, the Division reviews it for completeness. Utah Admin. Code R647-3-101.2 (small mine regulations), R647-4-101.1 (large mine regulations). If a large mine NOI is complete, the Division tentatively approves or disapproves it. Utah Code Ann. § 40-8-13(6)(a); Utah Admin. Code R647-4-101.2. The Division then publishes notice, accepts public comment, and if substantive objections are received the Division holds a formal hearing. Utah Code Ann. § 40-8-13(6)(d). The Division then makes a final decision. *Id.*

If the Division determines a small mine NOI is complete, "[e]xcept for the form and amount of surety, an approval of a notice of intention for small mining operations is not required." *Id.* § 40-8-13(5). Once the Division approves the form and amount of surety, the operator of a small mine may begin operations.

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[2] A small mine is any mine with five or less acres of disturbed area. Utah Code Ann. § 40-8-4(27).

An approved NOI "remains valid for the life of the mining operation, as stated in it, unless the board [or division] withdraws the approval as provided in Subsection (2)." *Id.* § 40-8-16(1).[3] The Board or Division may only withdraw approval if:

(a) "the operator substantially fails to perform reclamation or conduct mining operations so that the approved reclamation plan can be accomplished."

(b) "in the event that the operator fails to provide and maintain surety as may be required under this chapter."

(c) "in the event that mining operations are continuously shut down for a period in excess of five years, unless the extended period is accepted upon application of the operator."

Id. § 40-8-16(2). The Board or Division may not withdraw approval of an NOI until the operator "has had an opportunity to request a hearing before the board." *Id.* § 40-8-16(3).

If a change in the mining operation occurs, a large mine operator must submit a Notice of Intention to Revise Large Mining Operations. *Id.* § 40-8-18(1)(a); Utah Admin. Code R647-4-118. A small mine operator must file a revision to the NOI when a significant change in the operation occurs. Utah Admin. Code R647-3-115. If an operator expects the mining operations to terminate or cease for a period greater than two years, the operator must give notice to the Division and "shall furnish the division with such data as it may require in order to evaluate the status of the mining operation, performance under the reclamation plan, and the probable future status of the mineral deposit and condition of the land." Utah Code Ann. § 40-8-21(1),(2). Upon review of the information, "the Division will take such action as may be appropriate." Utah Admin. Code R647-3-113.3, R647-4-117.2.

All operators are "obligated to conduct reclamation and shall be responsible for the costs and expenses thereof." Utah Code Ann. § 40-8-12.5. The Division typically releases the surety

[3] The Division asserts that while a small mine NOI does not need approval, the Board may require a small mine operator to cease operations for the reasons it could withdraw approval of a large mine NOI.

upon completion of reclamation. "The full release by the division of surety posted under an approved notice of intention shall be prima facie evidence that the operator has fully complied with the provisions of this chapter." *Id.* 40-8-21.

B. The Division Issued SSQ a Large Mine Permit.

On November 6, 2000, the Division approved a notice of intention to commence large mining operations along with a reclamation surety submitted by SSQ (Peoa Blonde Mine M0430012) ("SSQ Permit"). SSQ submitted the NOI to mine sandstone/building stone. The NOI covers approximately 40 acres, of which SSQ may disturb approximately 25.7 acres. The SSQ permit covers a parcel of land referred to by the parties as Lot 38.

SSQ owns the surface estate on Lot 38. *Wright/Garff Resources, L.L.C. v. Thomas American Stone and Building, Inc.*, Civil No. 94-03-00111 (Utah 3rd Dist. Ct. Jan. 13, 1997). Wright/Garff Resources owns the mineral estate, except for a small portion of the mineral estate owned by BLM. *Id.* SSQ currently holds a mineral lease from BLM. In 2000, Wright/Garff leased its mineral estate to SSQ. During the lease period, SSQ excavated a quarry to extract the Wright/Garff mineral. The extraction activities created a highwall, pad, and waste dump which will eventually have to be reclaimed. The area disturbed by the quarry is greater than five acres.

The Wright/Garff mineral lease ended October 31, 2005 and was not renewed. The parties are currently involved in litigation regarding obligations under the lease. While the SSQ Permit allows extraction from Wright/Garff's mineral estate, due to the lack of a mineral lease SSQ no longer has that right. Nevertheless, SSQ still has a valid permit to conduct "mining operations" as stated in its NOI. SSQ is currently using the surface to store, split, and palletize rock from another quarry.[4] The SSQ NOI is silent with regard to this activity.[5]

[4] It is unclear to what extent SSQ is using the surface of Lot 38 to conduct mining operations in connection with extraction from the BLM lease.

C. Wright/Garff's Proposed Small Mine Notice of Intention.

Wright/Garff submitted a small mine NOI to mine the quarry excavated by SSQ.[6] The five acres Wright/Garff proposes in its NOI sits on Lot 38 and entirely within the SSQ permit boundaries. Because SSQ already holds a permit for Lot 38, the Division declined to process the Wright/Garff NOI.[7] Wright/Garff challenged the determination asking the Division to withdraw or modify the SSQ permit to accommodate Wright/Garff's proposed mining operations.

Wright/Garff's proposed NOI raises several concerns that have not been addressed, but should be considered as part of a resolution in this case. First, Wright/Garff submitted a small mine NOI with noncontiguous areas within an existing mine site. Transferring reclamation responsibilities for the noncontiguous areas to Wright/Garff but requiring SSQ to reclaim the surrounding areas could possibly interfere with adequate reclamation. The map shows neither access to nor reclamation of the property between the noncontiguous areas. Even if SSQ reclaimed the connecting property, Wright/Garff's activities would necessarily disturb that land. The Wright/Garff NOI does not present a realistic mine proposal that would allow for adequate reclamation.

Second, even if Wright/Garff's proposed small mining operation was one contiguous area, the current disturbed area for the quarry, including the road and immediate surrounding area, is much larger than five acres. This would result in one party performing reclamation on five acres in the middle of a disturbed 27-acre area and a second party reclaiming the

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[5] The definition of "mining operation" includes "activities conducted on the surface of the land for the exploration for, development of, or extraction of a mineral deposit, including, but not limited to, . . . milling." Utah Code Ann. § 40-8-4(14)(a). While stacking, splitting, and palletizing are milling activities, SSQ is not milling rock mined from Lot 38.

[6] Wright/Garff stated in its NOI that the purpose of the mining operations is for "Hauling of previously mined and extracted boulders and veneer and ground up stone and previously stockpiled soil." The NOI says nothing about mining the quarry. Ed Rogers stated during the informal conference that Wright/Garff did intend to mine the quarry.

[7] The Division never determined the completeness of Wright/Garff's NOI.

surrounding area. The Division is concerned that this situation could result in inadequate reclamation because the two sites would be reclaimed at different times and by different parties, leaving a spotted result. The property would not likely return to its pre-mined state under this circumstance.

Finally, Mr. Rogers indicated that Wright/Garff is not willing to assume the entire reclamation responsibility for its proposed mine site and would require SSQ to reclaim its share of the disturbance. The Division will not approve an NOI unless the surety will adequately ensure proper reclamation of the entire proposed mine site. Wright/Garff will have to post a bond for its entire site, regardless of whether it believes SSQ should be responsible.

III. DISCUSSION

The discussion will address the following questions sequentially:

A. What are the possibilities for dual permitting and what would be needed for implementation; could adequate definition of the parties' joint and separate responsibilities be developed for effective regulation; and

B. If dual permitting is not available, may the Division revoke or amend SSQ's permit to accommodate Wright/Garff's notice of intention?

A. Possibilities for Dual Permitting.

Neither the statute nor the regulations prohibit dual permitting. To issue dual permits, the Division would review the Wright/Garff NOI for completeness and determine whether the surety adequately provides for reclamation. *See* Utah Code Ann. § 40-8-13. Because dual permitting presents unique issues not addressed by the Utah Mined Land Reclamation Act, Title 40, Chapter 8 of the Utah Code ("Act") or its implementing regulations, the Division would also require a working agreement between the parties delineating the rights and obligations of each party. *See* Asphalt Ridge Oil Sands Mine, M/047/032, and Asphalt Ridge Mine, M/047/022 (prior dual permitting scheme).

The working agreement must address issues such as shared surface use and reclamation duties. A surface use agreement is essential because under SSQ's current permit, SSQ must reclaim the property on which Wright/Garff proposes to begin mining. SSQ cannot reclaim property as it is being mined. Furthermore, SSQ may be engaged in other surface activities on the proposed Wright/Garff mine site. Unless those activities could be conducted at the same time as Wright/Garff's mining activities, SSQ will have to agree to a reasonable accommodation. While the Division could potentially make a judgment call on what reasonable surface use might be, the Division is not in the position of dictating the minutia of surface use to mining operators. The Division opposes taking that position and putting itself at risk for future litigation.

More importantly, the parties must agree on reclamation duties and responsibilities. Under dual permitting, both SSQ and Wright/Garff would have the responsibility of reclaiming the Wright/Garff mine site. The parties would need to agree about the timing of reclamation and shared responsibilities. Wright/Garff stated at the informal conference that it expects SSQ to reclaim that property already disturbed. While the Division has the expertise and authority to determine the expected costs of reclamation, the Division does not have the expertise to apportion reclamation costs between parties. This type of valuation is generally included in the price one party would pay to another for a permit transfer. *See* Utah Code Ann. § 40-8-19 (permit transfers). Permit transfer prices are market driven and are not determined by the Division.

If the parties could come to agreement defining the surface use and reclamation duties, the Division could theoretically approve dual permits. The Division previously approved a dual permit for the Asphalt Ridge Oil Sands Mine and the Asphalt Ridge Mine. *See* Asphalt Ridge Oil Sands Mine, M/047/032, and Asphalt Ridge Mine, M/047/022. The parties only shared part

of the surface area and executed an agreement defining the rights and obligations of each party. Nevertheless, the Division spent years mediating disputes between the parties until they eventually split the permit. The Division hesitates to approve a dual permitting scheme under any circumstance, let alone one where—as here—the parties share a long bitter history.

The Division opposes dual permitting in this case because (1) due to the hostility between the parties, they are unlikely to reach agreement regarding surface use and reclamation duties; (2) without a working agreement, enforcing reclamation duties would be almost impossible; and (3) the hostility between the parties would likely force the Division to act as mediator.

1. The Division Opposes Dual Permitting Because the Parties are Unlikely to Reach Agreement About the Terms and Conditions of Surface Access and Reclamation Duties.

To approve a dual permitting scheme, the Division would require the parties to reach agreement delineating the rights and obligations of each party for surface use and reclamation duties. The parties must agree on their own, or with the help of the Division upon request; the Division cannot draft it for them. The Division opposes dual permitting because the parties are unlikely to reach agreement and, even if such agreement were drafted, the parties' long and hostile relationship does not support future cooperation or communication. Without cooperation and communication, the Division is concerned that future disagreements could interrupt or prevent adequate reclamation.

2. The Division Opposes Dual Permitting Without a Working Agreement Because Reclamation Duties Would be Almost Impossible to Enforce.

Without a working agreement, the Division cannot adequately enforce the rights and duties of each party or ensure proper reclamation. As discussed above, a working agreement would fill in the statutory gaps created by dual permitting. This is especially important where Wright/Garff proposes a small mining operation. Small mining operations do not need a

reclamation plan or even approval of the NOI. *See* Utah Code Ann. § 40-8-13. This would leave the Division with a reclamation plan from the non-mining operator and no reclamation plan from the mining operator, but both operators responsible for reclamation. Under this circumstance, the Division might not know which party is responsible for certain reclamation. The uncertainty could result in delayed and/or inadequate reclamation.

Similarly, the Division would have difficulty enforcing the laws governing the mining activity. If an operator violates the Act or its permit, the Division issues a cessation order to force the operator to comply with the governing law. *Id.* § 40-8-9. A working agreement would give the Division a blueprint to the surface and mining use on the property. Without this blueprint, the Division might not know which party is responsible for a certain violation or whether the party is in violation at all. For example, an action might be a violation of one permit, but not another; in which case, the Division could be stuck between warring parties to determine whether a violation occurred, who committed the violation, and who should rectify the problem.

3. The Division Opposes Dual Permitting Because it Would Force the Division to Mediate Between the Parties.

Dual permitting would require constant interaction between the parties. They have demonstrated their distrust and unwillingness to cooperate and communicate. The Division is concerned that dual permitting would force it to mediate between the parties every time a problem arises. The Division does not have the resources for that level of involvement.

As already discussed, in the prior dual permitting situation, the Division spent years mediating between the parties. In that case, the parties did not share a long bitter history and did not share the entire surface area. Nonetheless, dual permitting invites friction between

competing parties. The Division opposes again being placed in a position where it is forced to work as mediator between two mining parties.

B. Amending SSQ's Permit to Accommodate Wright/Garff's NOI.

In lieu of dual permitting, the Division proposes requiring SSQ to file a Notice of Intention to Revise Large Mining Operations to accommodate Wright/Garff's proposed NOI. The Division recognizes Wright/Garff's legally superior right as the mineral owner to extract its mineral and reasonably use the surface for purposes of extraction.[8] The statute and regulations do not directly address the Division's authority to resolve conflicts between surface and mineral owners. However, the Division has "jurisdiction and authority over all persons and property, both public and private, necessary to enforce" the Act. Utah Code Ann. § 40-8-5(1)(a); *see id.* § 40-6-15 ("The division shall implement the policies and orders of the board and perform all other duties delegated by the board.").

Under the Division's general authority to enforce the Act, it proposes the following solution,[9] discussed in detail below:

1. SSQ must immediately cease dumping materials over the highwall of the quarry or on any other portion of the proposed Wright/Garff mine site;

2. SSQ must submit a Notice of Intention to Revise Large Mining Operations to reflect the loss of the Wright/Garff mineral estate and its current mining activities;

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[8] Wright/Garff raised Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), to support its assertion that it owns a superior property right as the mineral owner. In *Watt*, defendant's successor-in-interest purchased property from the BLM for purposes of extracting gravel. *Id.* at 39. Pursuant to the Stock-Raising Homestead Act of 1916, "the patent reserved to the United States 'all the coal and other minerals' in the land." *Id.* Defendant obtained a state permit and began extracting gravel. BLM issued defendant a notice of trespass claiming the gravel was a "mineral" reserved to the United States. *Id.* at 40. The Court determined that under the Stock-Raising Homestead Act of 1916, "mineral" includes gravel, upholding the BLM's trespass action. *Id.* at 60. *Watt* is not applicable to this case.

[9] Withdrawal of SSQ's permit is not a viable option. The Board or Division may only withdraw approval of an NOI if the operator fails to reclaim or operates in such a way to prevent reclamation, fails to provide or maintain surety, or has shut down for longer than five years. Utah Code Ann. § 40-8-16(2). SSQ maintains adequate surety, conducts mining operations properly, and has not ceased operations for longer than five years. Therefore, the Board or Division cannot withdraw approval of the SSQ NOI.

3. Wright/Garff must submit a complete NOI proposing a logical mine plan with contiguous areas;

4. Wright/Garff must present to the Division a contract or some other assurance that it will perform the reclamation on its entire mine site and that all disagreements with SSQ about reclamation have been resolved;

5. Once the Division is satisfied with Wright/Garff's form and amount of surety, it will release SSQ's bond for the area covered by the Wright/Garff NOI.

1. SSQ Must Immediately Cease Dumping Material on the Proposed Wright/Garff Mine Site.

SSQ is currently dumping material over the highwall of the quarry with the intention of using the material for reclamation. Such actions will make it more difficult and expensive for Wright/Garff to mine the already-existing stone outcrop. SSQ should immediately cease dumping any materials on any portion of the proposed Wright/Garff mine site until and unless it receives notice from the Division that it may prepare to reclaim the site. The Division has authority to order SSQ to cease the action under its general authority to enforce the Act. Utah Code Ann. § 40-8-5(1)(a).

Any order to cease dumping would be temporary until the parties essentially transfer reclamation responsibilities from SSQ to Wright/Garff. In the event that Wright/Garff does not assume those reclamation responsibilities, SSQ will be expected to reclaim the site pursuant to its permit. The Division acknowledges that ordering SSQ to temporarily cease dumping material will inconvenience SSQ and potentially increase its costs in the event that it must reclaim the site. Nevertheless, such inconvenience is warranted on a temporary basis while the parties resolve the issues in this case.

2. SSQ Should Submit a Notice of Intention to Revise Large Mining Operations to Reflect the Lost Mineral Lease and to Accommodate Wright/Garff's Proposed Mining Activity.

"[A]n operator conducting mining operations under an approved [NOI] shall submit to the division a notice of intention when revising mining operations." *Id.* § 40-8-18(1)(a); *see also* Utah Admin. Code R647-4-102 ("the Division may review the permit and require updated information and modifications when warranted"). SSQ no longer extracts the mineral for which it obtained its NOI. Because SSQ's mining operations have changed, it must submit a Notice of Intention to Revise Large Mining Operations. Utah Admin. Code R647-4-118.1. As part of the amendment, SSQ should incorporate those changes necessary to accommodate Wright/Garff's proposed mining activity.

3. Wright/Garff Must Submit a Complete NOI Proposing a Logical Mine Plan with Contiguous Areas.

Before SSQ can revise its permit to reflect Wright/Garff's proposed mine plan, Wright/Garff must submit a complete NOI proposing a logical mine plan that will ensure adequate reclamation. As already discussed, Wright/Garff proposes to disturb five acres within an existing mine site. The Wright/Garff NOI also proposes several noncontiguous areas as part of the disturbed five acres. Wright/Garff has not proposed how it would access those noncontiguous areas or whether it would reclaim the access routes. Wright/Garff must submit an NOI where all portions of the mine connect and present a logical mine sequence so that it may be properly reclaimed at the end of mining.[10]

[10] If Wright/Garff includes the highwall in its NOI, it must include the entire highwall and its immediate surrounding area so that reclamation will not appear disjointed and negatively affect stability. Similarly, if Wright/Garff includes the rock piles in its NOI, it must include the disturbance area associated with those rock piles. The Division makes no representation that Wright/Garff has ownership of the rock piles. *See* 53A Am.Jur.2d *Mines and Minerals* § 4 (updated 2007) ("Minerals in place constitute real estate. When minerals are severed from the soil, they are generally considered to become personal property or chattels and subject to the laws that govern that species of property.").

4. Wright/Garff Must Present to the Division a Contract or Some Assurance that It Will Perform Reclamation on the Entire Proposed Mine Site and that All Disagreements with SSQ about Reclamation have been Resolved.

As already discussed in II.C of this memo, Mr. Rogers indicated at the informal conference that Wright/Garff expects SSQ to reclaim that portion of the property SSQ disturbed. SSQ holds a current large mine permit requiring it to reclaim the excavated quarry. The Division is more than willing to allow SSQ to reclaim the property before releasing its bond and issuing a permit to Wright/Garff. The Division will not issue a permit to Wright/Garff if it refuses to reclaim any portion of its proposed mine site.[11] Any dispute as to payment between the parties is an issue for the court and is not within the jurisdiction of the Division.

5. Once the Division is Satisfied with Wright/Garff's Form and Amount of Surety, it will Release SSQ's Bond for the Area Covered by the Wright/Garff NOI.

Once SSQ revises its permit, Wright/Garff submits a complete NOI and surety, and the Division approves the form and amount of surety, the Division will release SSQ's bond for the five acres of Wright/Garff's mine site, essentially transferring responsibility to Wright/Garff for the five acres. Generally, the Division only releases a surety upon final reclamation followed by three growing seasons. However, the Act provides:

> Whenever an operator succeeds to the interest of another operator who holds an approved [NOI] . . . by sale, assignment, lease, or other means, the division may release the first operator from his responsibilities under this approved [NOI] including surety, provided the successor assumes all of the duties of the former operator, to the satisfaction of the division, under this approved [NOI], including its then approved reclamation plan and the posting of surety.

Utah Code Ann. § 40-8-19.[12] The Division's suggestion in this case would essentially transfer SSQ's responsibilities to Wright/Garff for Wright/Garff's proposed mining operations. Once the

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[11] A permit carries with it an obligation to complete reclamation of any disturbance associated with it.

[12] Transfers are usually voluntary. *See* Utah Admin. Code R647-3-116, R647-4-120 ("If an operator wishes to transfer . . . .").

Division is satisfied that all duties from SSQ's NOI have been transferred, it will release SSQ of its responsibilities under its NOI and also release SSQ's bond for that portion of its mining operations to which Wright/Garff succeeds. A "full release by the division of surety posted under an approved [NOI] shall be prima facie evidence that the operator has fully complied with the provisions of this chapter." Utah Code Ann. § 40-8-21(8).

IV. CONCLUSION

The Division opposes dual permitting in this case because dual permitting would require cooperation and communication between the parties. SSQ and Wright/Garff have proved their unwillingness to work together, making any future surface and reclamation sharing agreement unlikely. In lieu of dual permitting, the Division suggests SSQ immediately cease dumping any material on the proposed Wright/Garff mine site and then submit a Notice of Intention to Revise Large Mining Operations to reflect the lost mineral lease and current mining activity. Before SSQ can revise its NOI, Wright/Garff must submit a logical small mine NOI that would assure adequate reclamation. Once both parties submit their respective NOI's, Wright/Garff posts adequate surety, and the Division is satisfied that Wright/Garff has assumed all of SSQ's rights and responsibilities for its proposed mining operations, the Division will release SSQ of its responsibilities under its NOI for the proposed Wright/Garff mine site, including the bond covering that area.

DATED this 26th day of March, 2007.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

Keli Beard
Assistant Attorney General

IN THE MATTER OF:
THE APPLICATION OF WRIGHT/GARFF
FOR A SMALL MINE PERMIT

MEMORANDUM OF LON THOMAS IN SUPPORT OF DECISION TO NOT PROCESS THE APPLICATION OF WRIGHT/GARFF TO CONDUCT SMALL MINING ACTIVITY

This memorandum is submitted at the request of the Department Head of the Department of Natural Resources by Lon Thomas and Star Stone Quarries (Lon Thomas). It was requested that Lon Thomas and Wright/Garff submit memorandums addressing the question whether or not a permit could be issued to Wright/Garff, in essence, over the top of the permit of Lon Thomas. Lon Thomas supports the findings and the decision of the staff of the Department to refuse to process the application of Wright/Garff, therefore effectively denying the same.

1. THE HOSTILITY OF WRIGHT/GARFF.

The staff made a finding that there is hostility between Lon Thomas and Wright/Garff. This certainly is correct. As stated at the previous informal hearing by counsel for Lon Thomas an attempt was made to sit down with Ed Rogers and see if any solution could be negotiated. Ed Rogers at that time stated that he would negotiate nothing, that he would appeal at every level until he got his permit and that he would see that Lon Thomas was kicked off the site. There is pending litigation between the parties in which Ed Rogers has falsely accused Lon Thomas of stealing stone and Wright/Garff has refused to renew the previous lease for Lon Thomas to continue to quarry building stone on the property. Even after the lease was terminated with Wright/Garff Ed Rogers has made additional false allegations that Lon Thomas has stolen building stone.

2. LON THOMAS HAS VESTED RIGHTS.

Vested rights in permits are universally protected. The California Supreme Court has stated the vested rights rule as follows: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 [49 L.Ed. 169, 25 S.Ct. 18]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal. App. 2d 776, 784 [194 P.2d 148]. In Utah to obtain a vested right in a permit in an analogous zoning situation the court in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980), held that an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.

In water law cases an applicant for a permit must make a prima facie showing that the granting of the permit will not impair existing vested water rights. *Provo Water Users Association v. Lambert*, 642 P.2d 1219 (Utah 1982). If the vested right is a significant right it may not be extinguished or abridged by a body lacking judicial power. *Whaler's Village Club v. California Coastal Com.* 173 Cal.App.3d 240. The doctrine is applicable to land use and underwrites a vested right to a particular use of land in special circumstances when the landowner has acted in accordance with established law, or with the permission of the appropriate governmental agencies. id. A permit to use land cannot be revoked or altered arbitrarily. *Emmett McLoughlin Realty, Inc. v. Pima County*, 58 P .3d 39, 43 (Ariz.Ct.App.2002)

By granting Lon Thomas a large mining permit he obtained a vested right to continue operations for the life and the mine and reclamation efforts thereafter that cannot be altered or revoked unless he violates the terms of the permit, thereby giving him vested rights. The suggestion of Mr. Rogers that the department revoke Lon Thomas' permit to allow Wright/ Garff to quarry has no basis in the statutes or regulations governing this department and would offend the principle of vested rights. Only if Wright/Garff could make a prima facie showing that the granting of the Wright/Garff permit would not infringe on the vested rights of Lon Thomas to conduct his present operations and reclamation should a permit be issued to it.

3. WRIGHT/GARFF CAN QUARRY BUILDING STONE AFTER LON THOMAS HAS FINISHED RECLAMATION.

Wright/Garff could have included in the building stone lease they granted to Lon Thomas that at the end of the lease Lon Thomas would be required to transfer his mining and reclamation permits to Wright/Garff. If they had done so we would not have the present conflict. Failing to do so they now have no complaint that Lon Thomas can continue mining operations and finish his reclamation before they commence to quarry the remaining building stone. It should have been obvious to Wright/Garff when they leased the property to Lon Thomas that if they did not allow him to continue to quarry building stone that they would then have to wait to quarry until Lon Thomas had finished his operations and reclaimed the property.

4. THE ACTIVITIES OF LON THOMAS AND WRIGHT/GARFF ARE INCOMPATIBLE.

Lon Thomas has the right under his permit to mill stone that he is presently bringing in from other property. That is to process the stone by splitting and placing in pallets. He also has

the right to quarry rock from his BLM lease and crush it. Both of these activities are inherently incompatible with Wright/Garff's proposed mining activities. Even more compelling though is Lon Thomas's obligation and right to complete his reclamation. This includes among other activities the filling in of the very pit that Wright/Garff proposes to quarry from.

As the finding of the staff rightly states the reclamation and quarrying activities cannot be conducted at the same time. The position of the division that it will not permit two mines over the same area is totally reasonable and should apply if and until one proposing to permit the same area that is already permitted can present a prima facie case that the second permit will not interfere with the first. There may very well be situations where this could be shown, but certainly not in the matter now before the board.

5. THE POWER OF THE BOARD IS LIMITED.

Administrative bodies may exercise such powers only as are either expressly or by implication conferred upon it by statute; that is, it has no inherent power such as must frequently be exercised by courts of general jurisdiction *Crain v. W.S. Hatch Co.,* 451 P.2d 788, 22 Utah 2d 280. An administrative agency can only wield powers expressly or implicitly granted to it by statute. *TIG Ins. Co. v. Kauhane*, 101 Hawaii 311, 327, 67 P.3d 810, 826 (App. 2003). However, it is well established that an administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted , *Inc. v. Toledo-Lucas County Bd. of Health*, 773 N.E.2d 536, 545-46 (Ohio 2002) (noting that a statute's grant of power to an administrative agency "may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective"); *Public Util. Comm'n of Texas v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310,

315 (Tex. 2001) ("The basic rule is that a state administrative agency has only those powers that the Legislature expressly confers upon it. But an agency may also have implied powers that are reasonably necessary to carry out the express responsibilities given to it by the Legislature."). The reason for implied powers is that, "[a]s a practical matter, the [l]egislature [cannot] foresee all the problems incidental to . . . carrying out . . . the duties and responsibilities of the [agency]." *See C.C.T. Equip. Co. v. Hertz Corp.*, 123 S.E.2d 802, 806 (N.C. 1962).

In this matter the board has properly viewed their function and not attempted to take action they are not empowered to take. It certainly is implied in the statutes and rules governing this body that they will not take action to impair vested rights and that it would be unreasonable to attempt to administer two permits for the same area. The board then must protect the permit of Lon Thomas with vested rights and deny the proposed permit of Wright/Garff that would create a situation that would be impossible to administer.

The present proposed action would be analogous to a situation where a board was charged with issuing permits for the use, lets say, of a concert hall. The hypothetical regulations only state that if an applicant meets certain criteria they will be granted a permit to use the hall. In January the board issued a permit for an orchestra to use the hall on July 4, 2007. In June another orchestra requested a permit to perform in the same hall on July 4, 2007, at the same time for which the permit was already issued. Even though the regulations did not address this situation the board would have implied power to deny the second application because it would interfere with a permit already issued and its decision to deny the second application would be appropriate and proper.

6. CONCLUSION.

The staff findings and decision not to process the application of Wright/Garff is proper and appropriate. It is impossible to accommodate the present operation and reclamation of Lon Thomas and the proposed quarrying of Wright/Garff. Wright/Garff must either reach an agreement with Lon Thomas or wait to quarry until Lon Thomas has finished his mining and reclamation. Wright/Garff created this dilemma, not Lon Thomas and not the board.

DATED: March 26, 2007.

Ronald George, attorney for Lon Thomas

NOTICE OF SERVICE

I certify that on March 26, 2007, I served a copy of the foregoing memorandum by facsimile and first class mail as follows:

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Ronald George, attorney for Lon Thomas

IN THE MATTER OF:
THE APPLICATION OF WRIGHT/GARFF
FOR A SMALL MINE PERMIT

MEMORANDUM OF LON THOMAS IN SUPPORT OF DECISION TO NOT PROCESS THE APPLICATION OF WRIGHT/GARFF TO CONDUCT SMALL MINING ACTIVITY

This memorandum is submitted at the request of the Department Head of the Department of Natural Resources by Lon Thomas and Star Stone Quarries (Lon Thomas). It was requested that Lon Thomas and Wright/Garff submit memorandums addressing the question whether or not a permit could be issued to Wright/Garff, in essence, over the top of the permit of Lon Thomas. Lon Thomas supports the findings and the decision of the staff of the Department to refuse to process the application of Wright/Garff, therefore effectively denying the same.

1. **THE HOSTILITY OF WRIGHT/GARFF.**

The staff made a finding that there is hostility between Lon Thomas and Wright/Garff. This certainly is correct. As stated at the previous informal hearing by counsel for Lon Thomas an attempt was made to sit down with Ed Rogers and see if any solution could be negotiated. Ed Rogers at that time stated that he would negotiate nothing, that he would appeal at every level until he got his permit and that he would see that Lon Thomas was kicked off the site. There is pending litigation between the parties in which Ed Rogers has falsely accused Lon Thomas of stealing stone and Wright/Garff has refused to renew the previous lease for Lon Thomas to continue to quarry building stone on the property. Even after the lease was terminated with Wright/Garff Ed Rogers has made additional false allegations that Lon Thomas has stolen building stone.

2. LON THOMAS HAS VESTED RIGHTS.

Vested rights in permits are universally protected. The California Supreme Court has stated the vested rights rule as follows: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195 U.S. 223 [49 L.Ed. 169, 25 S.Ct. 18]; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal. App. 2d 776, 784 [194 P.2d 148]. In Utah to obtain a vested right in a permit in an analogous zoning situation the court in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980), held that an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest.

In water law cases an applicant for a permit must make a prima facie showing that the granting of the permit will not impair existing vested water rights. *Provo Water Users Association v. Lambert*, 642 P.2d 1219 (Utah 1982). If the vested right is a significant right it may not be extinguished or abridged by a body lacking judicial power. *Whaler's Village Club v. California Coastal Com.* 173 Cal.App.3d 240. The doctrine is applicable to land use and underwrites a vested right to a particular use of land in special circumstances when the landowner has acted in accordance with established law, or with the permission of the appropriate governmental agencies. id. A permit to use land cannot be revoked or altered arbitrarily. *Emmett McLoughlin Realty, Inc. v. Pima County*, 58 P .3d 39, 43 (Ariz.Ct.App.2002)

By granting Lon Thomas a large mining permit he obtained a vested right to continue operations for the life and the mine and reclamation efforts thereafter that cannot be altered or revoked unless he violates the terms of the permit, thereby giving him vested rights. The suggestion of Mr. Rogers that the department revoke Lon Thomas' permit to allow Wright/ Garff to quarry has no basis in the statutes or regulations governing this department and would offend the principle of vested rights. Only if Wright/Garff could make a prima facie showing that the granting of the Wright/Garff permit would not infringe on the vested rights of Lon Thomas to conduct his present operations and reclamation should a permit be issued to it.

3. WRIGHT/GARFF CAN QUARRY BUILDING STONE AFTER LON THOMAS HAS FINISHED RECLAMATION.

Wright/Garff could have included in the building stone lease they granted to Lon Thomas that at the end of the lease Lon Thomas would be required to transfer his mining and reclamation permits to Wright/Garff. If they had done so we would not have the present conflict. Failing to do so they now have no complaint that Lon Thomas can continue mining operations and finish his reclamation before they commence to quarry the remaining building stone. It should have been obvious to Wright/Garff when they leased the property to Lon Thomas that if they did not allow him to continue to quarry building stone that they would then have to wait to quarry until Lon Thomas had finished his operations and reclaimed the property.

4. THE ACTIVITIES OF LON THOMAS AND WRIGHT/GARFF ARE INCOMPATIBLE.

Lon Thomas has the right under his permit to mill stone that he is presently bringing in from other property. That is to process the stone by splitting and placing in pallets. He also has

[illegible] from his BLM lease and crush it. Both of these activities are inherently